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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 439

PANTZER LUMBER COMPANY,
Petitioner,

vs.

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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November 12, 1947.

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SUPREME COURT OF THE UNITED STATES

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No.

PANTZER LUMBER COMPANY,

Petitioner,

vs.

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered in this cause on June 13, 1947, which affirmed the judgment of the District Court of the United States for the Eastern District of Wisconsin.

Summary Statement of the Matter Involved

Petitioner is a retail lumber company doing business in Sheboygan, Wisconsin, and operates both a retail lumber distribution yard and an independent millwork shop (R. 11,

15). Petitioner purchased Sitka Spruce lumber from western lumber mills (R. 12), cut appropriate tent pole lengths from that lumber, and then processed the lengths into finished tent poles (R. 12-13). When the lengths were cut out, residue material was left. This residue was stored separately; ineffective efforts were at first made to sell it, as it was, in substantial quantities; and finally Petitioner was able to sell the residue, after it was remanufactured and processed, to a toy manufacturer (R. 13-14).

During this period, lumber was subject to price control under the Emergency Price Control Act of 1942, as amended, and to priorities control by the War Production Board. The Price Administrator brought suit for an injunction and for treble damages (R. 1-3), claiming that Petitioner's prices for this reworked residue material exceeded applicable maximum prices set by the Office of Price Administration. The Price Administrator's contention was that Petitioner's prices violated Maximum Price Regulation 215 and Maximum Price Regulation 290, taken together, in the following manner: MPR 215, relating to sales through distribution yards of softwood lumber, covers "sales out of distribution yard stock of any lumber or lumber products for which 'direct-mill' maximum prices are fixed in * * * Maximum Price Regulation 290." M. P. R. 290 covers "all Sitka spruce (*picea sitchensis*) lumber, whether the grades, sizes and specifications are specifically named in the price tables in Article V or not." Article V contains certain price tables. Article II, Section 11, provides: "(a) If a seller wishes to sell a grade which is not specifically priced in the price tables, or wishes to make an addition for special workings, specifications, services, or other extras for which additions are not specifically permitted, he must apply to the Lumber Branch, Office of Price Administration, Washington 25, D. C., for a maximum price * * * (d) On any sale involving a 'non-

listed' price or addition contemplated by paragraph (a) of this section, if the seller, for any reason, shall have failed to apply for approval of a maximum price under paragraph (a), the maximum price for the item sold shall be $15.00 per 1000 board feet, which maximum price shall include all allowances or additions for grade, size, conditions, special workings, specifications, or other extras."

Petitioner did not apply for a special price for sales of the reworked residue material (R. 17), and the price charged by Petitioner was in excess of $15.00 per 100 board feet as a base (R. 17; 81-92).

Petitioner contended that (a) the processed residue material was not "lumber", as was shown by a definition and interpretation of the War Production Board (R. 39) and therefore was not covered by the regulations; (b) an O.P.A. interpretation (R. 30) relied upon by the Price Administrator to prove the material to be lumber was not applicable, but if applicable, was clearly contrary to the practice in the trade, as shown by the consistent testimony of witnesses intimate with the lumber business, and therefore was in excess of the authority of the Price Administrator; (c) the Administrator's actions misconstrued the statute; (d) these residue materials, when processed and sold, were the product of Petitioner's millwork shop, and as such were not covered by regulations governing lumber distribution yards; and (e) the prices charged by Petitioner were within the maximum permissible prices set by any applicable O.P.A. regulation.

The trial court held that the processed residue material was lumber and was covered by price regulations, and that the prices charged were in excess of the maximum prices permitted; and the court awarded a judgment of $8,292.94, one and one-half the amount of the asserted overcharge, together with costs (R. 95-102).

The Circuit Court of Appeals for the Seventh Circuit affirmed the judgment of the trial court, adopting the same reasons (R. 123-28).

Jurisdiction

The decree of the District Court was entered on June 13, 1947. The mandate of the Circuit Court of Appeals was issued to the District Court on July 7, 1947. An order extending the time for filing a petition for certiorari until and including November 12, 1947, was issued by this Court on September 10, 1947. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. 347(a)).

Questions Presented

(1) Whether a person acting in accordance with a ruling of one Federal administrative agency may be penalized under an interpretation of another Federal agency, when the two Federal administrative rulings are in conflict.

(2) Whether the O.P.A. interpretation is invalid as contrary to the accepted practice in the trade and therefore beyond the statutory authority of the Price Administrator.

(3) Whether the operations of Petitioner are subject to the O.P.A. regulations relied upon below.

(4) Whether the residue material was lumber within the meaning of the Price Control Act of 1942, as amended, and within the regulations of the Office of Price Administrator.

(5) Whether the prices charged by Petitioner were in excess of the maximum prices permitted by O.P.A. regulations.

Reasons for Granting the Writ

This cause presents an important question in the conflict of Federal administrative agencies—whether a person subject to the regulation of two Federal agencies, which have jurisdiction over the same subject matter, may be penalized under the regulations of one agency, when he has diligently observed the rulings of the other agency. The importance of this question transcends the existence of the two agencies here involved, and the duration of wartime controls, for our expanding governmental regulation often duplicates and overlaps itself even in time of peace. It is necessary that this Court prescribe how far reliance upon one of two conflicting administrative rulings will protect business men and others in the American economy. This Court has many times considered questions involving the impact of two or more Federal administrative agencies upon the same person or organization, but always, before this, the Court has been able to find that the various statutes meshed, or that only one of the agencies had jurisdiction over a particular activity. In this cause, there is no doubt that both agencies had jurisdiction and that the administrative rulings were in conflict.

Involved also are questions of the proper construction of an important Federal statute, the Emergency Price Control Act of 1942, as amended—a Federal statute which covered more persons and extended into more areas than any other law in the history of the United States. There are here involved questions of the authority of the Price Administrator to promulgate an interpretation not only in conflict with rulings of the War Production Board, but contrary to the established understanding in the trade, and at variance with the consistent and disinterested testimony of expert witnesses.

Finally, this cause involves rulings of the courts below,

on questions of law and questions of fact that are clearly wrong and should be reversed by this Court. While this Court does not ordinarily grant certiorari merely to correct error, there is no doubt that its jurisdiction is sufficient for this purpose; and in the exercise of its supervisory power over the lower Federal courts, this Court has not infrequently found it necessary to grant the writ so that demonstrable error will not prevail. The courts below have decided the questions of law and fact, concerning whether this processed residue material was lumber, whether it was within the pricing regulations, and whether the regulations would be valid if applied to this material, contrary to the evidence in the case, contrary to established authorities, and without competent support in the record. If this Court will not grant certiorari to reverse, manifest injustice will have been done.

Conclusion

It is respectfully submitted that the petition for a writ of certiorari be granted.

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SUPREME COURT OF THE UNITED STATES

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PANTZER LUMBER COMPANY,

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PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR,

Respondent

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Opinions Below

The opinion of the Circuit Court of Appeals (R. 123-28) is reported in 162 F. (2d) 276. The opinion of the United States District Court (R. 95-97) is reported in 70 F. Supp. 716 *sub. nom. Bowles* v. *Pantzer Lumber Company.*

Jurisdiction

The basis of the jurisdiction of this Court is set out in the accompanying petition for a writ of certiorari.

Statement of the Case

A summary statement of the case is set out in the accompanying petition for a writ of certiorari.

Assignment of Errors

The court below erred:

(a) In holding that the residue material, when processed and sold, was "lumber" within the meaning of O.P.A. maximum price regulations;

(b) In failing to hold that the O.P.A. interpretation relied upon by the Administrator was invalid because it was in conflict with the established usage in the trade;

(c) In failing to hold that the W.P.B. order defining "lumber" correctly stated the meaning of that word;

(d) In failing to hold that Petitioner conformed to an applicable W.P.B. order and therefore should not be held in violation of a conflicting governmental interpretation;

(e) In holding that Petitioner's finishing mill operations were subject to the O.P.A. regulations covering lumber yards;

(f) In holding that the prices charged by Petitioner were in excess of the maximum permissible prices set by O.P.A. regulations.

ARGUMENT

I

This Case Presents a Problem in the Conflict of Administrative Agencies Which Has Not Been But Should Be Settled by This Court

It is established by the Rules of this Court that a conflict of decisions of circuit courts of appeals, or a conflict of a decision of a circuit court of appeals with a local court on

matters of local law, will be a reason for granting review on a writ of certiorari. Rule 38(a), (b). The case at bar presents a cognate question, but one much more far-reaching in its application to the American scene; it presents the issue of a conflict of administrative agencies having jurisdiction over the same person and over the same business, where the rulings of the agencies on the same point are mutually exclusive. Petitioner followed one ruling diligently. This proceeding represents an attempt to penalize Petitioner because another agency with jurisdiction asserts that Petitioner's actions were in violation of a contrary ruling.

As a retail lumber company, Petitioner during the war was subject to both the O.P.A. and the W.P.B. Normally these agencies operated within different spheres, and no conflict ensued. The present case, however, represents an unwitting divergence between the two agencies on the question of whether the residue material processed and sold by Petitioner is "lumber." W.P.B. Order No. L-335 (R. 39-40), issued June 23, 1944, specifically defined the word "lumber" to exclude the material in question here in stating:

> " 'Lumber' means any sawed lumber of any species, size or grade, including round edge, rough, dressed on one or more sides or edges, dressed and matched, shiplapped, worked to pattern, or grooved for splines, except: * * * (v) items produced from lumber but not classified in the trade as lumber, such as box shook, *dimension stock, cut stock,* and millwork; and (vi) used lumber." (Italics added.)

The material here, by admission of Respondent's own witness (R. 21) is cut stock or dimension stock. This corresponds with the testimony of Petitioner's witnesses (R. 51, 57, 62, 67). The W.P.B. order was the order that Petitioner "lived by" for a considerable time (R. 39). But

Respondent has produced an interpretation of the Price Administrator (R. 30) which purports to define this material as lumber. It will be argued later in this brief that the O.P.A. interpretation is entitled to no weight; but assuming now, as the courts below assumed, that the O.P.A. interpretation is pertinent, we face a conflict of interpretations.

This Court has never resolved the question at bar, though it has decided many cases in which two or more administrative agencies asserted jurisdiction. In *Swift & Co.* v. *United States*, 316 U. S. 216, and *Southland Gasoline Co.* v. *Bayley*, 319 U. S. 44, the Court found the statutes were integrated, and that while both agencies in each case had jurisdiction, there was a clear boundary between the coverage of each agency. *Union Stock Yard Co.* v. *United States*, 308 U. S. 213, presented the dilemma of a company which was subject to *one* of two agencies, but not both, and this Court was called upon to determine which. *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, was a somewhat similar case in which a railroad was held entitled to an extraordinary legal remedy to obtain judicial determination whether it was subject to the Railway Labor Act or the National Labor Relations Act. Many more cases might be cited, but they fall into the same pattern: either (a) only one of the agencies has jurisdiction over the person or subject matter, or (b) both agencies have jurisdiction, but there is no overlap. Those cases are of no assistance here.

In an expanding and more complex American economy, the problem presented here will recur many times, the dilemma will worsen, unless this Court lays down a rule by which our growing administrative agencies must conduct themselves and on which business men can rely. If it will not help business men to follow the rulings of an agency

they "live with", which exercises an almost supervisory control over their daily practices, it is time they were told what to do to avoid future penalization by some more distant administrative relative in the executive branch of the government. Essentially this is a problem in the dynamics of a regulated private enterprise economy, such as we have here in the United States, and this Court should aid both business and government to avoid the "unfortunate" situations, appearing so often in the press during the recent war, where penalities may be inflicted upon a person who has obeyed to the best of his ability that amorphous creature—"the Government."

II

The Material Sold by Petitioner Was Not "Lumber"

A focal point of dispute in this case is whether the material sold by Petitioner was "lumber." If it was not, there was no violation of any governmental regulation (R. 6). If it was, there still may be no violation of regulations, since Petitioner contends that the milling operations involved here were not covered by the regulations relied upon by the Price Administrator.

Petitioner contended below that the residue material, left over after the processing of tent poles from lumber, when processed further and sold to a toy manufacturer, was not lumber but was what is universally known in the trade as "dimension stock" or "cut stock," generally sold as moulding. This was the testimony of Petitioner's president (R. 42, 48); it is the definition of the War Production Board (R. 39); it was the testimony of four expert witnesses (R. 51, 57-59, 61, 67); and more witnesses were dispensed with in order to avoid repetition (R. 59).

Against this proof, Respondent offered only two things:

(a) the testimony of a single witness employed by O.P.A. (R. 18), not experienced in Petitioner's field of operations (R. 20), and (b) an O.P.A. interpretation of general application (R. 30).

It was conceded by both the trial court (R. 96) and the court below (R. 126-27) that the residue material was not included within the language of O.P.A. regulations. The court below expressly found that "Notwithstanding the detailed specificity of the Regulations, it happened that the particular wood product under consideration was not covered." Yet the trial court, relying upon an administrative interpretation which it said was "not plainly erroneous" (R. 97), and the court below, apparently relying only upon the fact that "the country was at war" (R. 127), held the material to be lumber within the coverage of these maximum price regulations.

This Court does not ordinarily issue a writ of certiorari merely to correct error. Yet the Court's jurisdiction on certiorari patently extends to "any case," 28 U. S. C. 347(a), and the statute vests in the Court "a comprehensive and unlimited power" to review the decision of a circuit court of appeals. *Forsyth* v. *Hammond*, 166 U. S. 506. The Court has often exercised a supervisory power to correct palpable error in the decision of a court of appeals, where an important Federal statute is involved, as was the case in *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publisher Co.*, 293 U. S. 268, *Buffum* v. *Peter Barceloux Co.*, 289 U. S. 227, and *Reynolds* v. *United States*, 292 U. S. 443; it has granted certiorari to remedy manifest injustice, as in *Southern Railway Co.* v. *Walters*, 284 U. S. 190, *Stringfellow* v. *Atlantic Coast Line Co.*, 290 U. S. 322, *McCandless* v. *United States*, 298 U. S. 342, and *Ormsby* v. *Chase*, 290 U. S. 387. The exercise of this Court's supervisory power is even clearer in criminal cases, as witness

its granting of certiorari in *Alford* v. *United States,* 282 U. S. 687, *Husty* v. *United States,* 282 U. S. 694, *Escoe* v. *Zerbst,* 295 U. S. 490, and *Shepard* v. *United States,* 290 U. S. 96, a category of cases close to the punitive aspects of the case at bar.

Neither the trial court nor the court below made any findings, based upon evidence, that the material here was lumber. In both cases the courts seemed to have been moved by the thought that this material *should* have been covered by the regulations, and ignored the fact that it was not covered. The undisputed facts reveal the following situation.

A single board going through a moulding machine was cut into a tent pole, with some material left over (R. 13). Since both tent poles and boards varied in size, the residue material varied in size (R. 12-13). The tent poles which emerged were concededly not lumber, though further processing was necessary to finish them for final use (R. 26). The residue material which, like the portion cut as a tent pole, had also been cut and moulded from the original board, also underwent some further processing to fit it for final use (R. 22). There was no difference in the two portions, before or after going through the moulding machine, except of course as to the final use to which they would be put. Yet O.P.A.'s only witness—a member of the O.P.A. staff, not an independent expert—admitted that the tent poles were *not* lumber but contended that the residue material emerging at the same time *was* lumber (R. 22). No other witness was produced to substantiate this extraordinary claim, which borders on a schizophrenic analysis of identical material. The O.P.A. witness appears to have taken the position that no matter what processing wood has undergone, it is still lumber if any further processing is contemplated (R. 22). That this is nonsense is shown by

the testimony of every other witness who appeared, and by the W. P. B. definition. It is nonsense as applied in this very case to the tent poles.

The *only other* portion of the flimsy foundation erected to call this residue material "lumber" is an O.P.A. interpretation entitled "Mill Trims" (R. 30). It is found in the official O.P.A. Service (Lumber Desk Book, p. 1051) under the heading of "Interpretations of General Applicability" and is merely a blunderbuss attempt to blanket all short lengths into the category of lumber. It far exceeds the meaning of the term "mill trims" as commonly used in the trade to mean the irregular or defective ends cut off pieces of lumber which are themselves irregular.

No doubt the pattern for the weight given to interpretations of administrative regulations was set by this Court in *Bowles* v. *Seminole Rock and Sand Co.*, 325 U. S. 410, 414, where it was said that such an interpretation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." But the interpretation here, while entitled to weight in cases where it is correctly applied—as in the situation of pieces recognized in the trade as mill trim—is clearly erroneous when in conflict with the consistent testimony of all the competent witnesses produced, with the established practice in the trade, and with an interpretation of the W.P.B. Administrative interpretations have their recognized limitations, and the "great weight" accorded them has been expressly said by this Court to apply only to the extent of "properly supported findings of fact." *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369. It is not enough for an agency to issue an interpretation and insist that the interpretation is applicable in all cases; the agency must show that the interpretation applies to the particular case and is supported by the facts of that case. No such burden has been met

here, and the mere existence of such an interpretation has no relevance to the question of whether it is applicable.

The material sold in this case was not mill trim, to which the interpretation is applicable. It may or may not have been mill trim after it emerged from the moulding machine; but when processed further for sale, it became "dimension stock" or "cut stock", and was such *when sold* (R. 44, 51, 57, 61, 67). This is the consistent meaning in the trade, as shown by the witnesses and as recognized by the W.P.B. definition. Of course the maximum price regulations apply to material when sold, not to material at some previous time in its history. The interpretation is thus either not applicable, or, if applied, is void for conflict with the evidence, the W.P.B. definition, and the established usage in the trade.

III

Petitioner's Finishing Mill Operations Were Not Subject to O. P. A. Regulations Covering Lumber Yards

The two regulations involved here, M.P.R. 215 and M.P.R. 290, do not cover the operations of Petitioner in this case.

M.P.R. 215 covered "sales out of distribution yard stock" for which "direct-mill" maximum prices were fixed in certain regulations, including M.P.R. 290 (See M.P.R. 215, Article I, Section 3, subsections (a) and (b)). M.P.R. 290 applied to "Sitka Spruce lumber for direct-mill shipment" (M.P.R. 290, Sections 1 and 3).

The material involved here was not the subject of direct-mill shipment from distribution yard stock, and the decisions below merely reflect a complete misunderstanding of the nature of Petitioner's activities. The courts below confused two separate operations of Petitioner—(1) a retail lumber distribution yard, and (2) a finishing mill (or millwork shop), which is "an entirely different operation"

of Petitioner (R. 15). The O.P.A. regulations covered sales from the first operation, but not at all from the second, which is the operation producing the residue material in this case. The confused merger of these two activities began with counsel for Respondent in the trial court (R. 15), when he received an answer not at all to his liking, and was perpetuated in the decisions of the courts. They have confused the word "mill" wherever it appears by assuming that all mills are sawmills or planing mills, which are expressly covered in Section 3 of M.P.R. 290. But a finishing mill, which processes lumber into a particular product, is of a wholly different class than a sawmill, which produces raw lumber; and these lumber regulations obviously apply only to mills producing lumber. A millwork shop, as here, is not a lumber yard; its products are manufactured goods, not lumber; and its sales are therefore not covered by *these* regulations.

IV

Petitioner's Prices Did Not Exceed the Maximum Prices Permissible under the Regulations

Perhaps the worst error of all those made by the court below was that it assumed that if the material here was lumber, and if the regulations applied to these operations of Petitioner, then the maximum base price permissible was $15,000 per thousand board feet (R. 127). The court below rejected Petitioner's argument that its sales were covered by Condition 20 of Table 5 of M.P.R. 290, which concededly allowed maximum prices higher than those charged by Petitioner, and accepted Respondent's argument that Table 8, not Table 5, applied.

Table 5 is entitled "Sitka Spruce Finish and Clears." Table 8 is entitled "Sitka Spruce Shop." Since the lumber purchased by Petitioner was shop grade lumber (R. 12,

31-32), the court below rather cavalierly held that the material here came within Table 8 and thus did not obtain the pricing benefits of Table 5 (R. 127-28).

The court's egregious error on this point consisted of confusing the material purchased and the material sold. It is true that Petitioner itself purchased shop grade lumber, which roughly may be described as fairly clear lumber with a few defects intermittently scattered (R. 12, 32). But Petitioner then cut out the defects (which are not usable) and thus obtained "clear cuts" from the original shop lumber (R. 12, 32). The material in this case, the subject of this litigation, was all processed according to the ultimate purchaser's requirement that it "run clear," and was obtained in *toto* from the clear cuts of Petitioner (R. 32-33). Thus regardless of what Petitioner purchased, what Petitioner *sold* was Sitka Spruce clears, within the meaning of Table 5.

Using the special pricing provisions of Table 5, the maximum price permissible in this case can be shown to be $118.32 per thousand board feet, rather than the $15.00 arbitrary figure adopted by the court below. Since Petitioner's prices averaged $100 and less (R. 31, 81-92), its prices were considerably below the maximum prices that it could have charged, if the material be assumed to be lumber and within the scope of the O.P.A. regulations. The court below made the most elementary of errors in confusing Petitioner's own purchases and Petitioner's sales.

Conclusion

The judgment of the court below, even if it were correct, would represent merely one attempted solution to a complex problem that ought to be settled by this Court, in simple justice to a complicated economy. It ought to be settled by this Court as an exercise of this Court's super-

visory power over the varied and often conflicting branches of government. But the judgment of the court below is not correct; it bears demonstrable error on its face, and ought to be reversed by this Court so that grievous injustice will not have been done in this case.

Petitioner therefore urges that the petition for certiorari be granted.

Respectfully submitted,

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CITATIONS

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In the Supreme Court of the United States

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v.

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 123–128) is reported at 162 F. 2d 277. The opinion of the district court (R. 95–97) is reported at 70 F. Supp. 716. The district court's findings of fact and conclusions of law appear at pages 99–101 of the record.

JURISDICTION

The judgment of the circuit court of appeals was entered June 13, 1947 (R. 129). On September 10, 1947, the time for filing a petition for

a writ of certiorari was extended to and including November 12, 1947, by order of Mr. Justice Burton (R. 132), and the petition was filed on that date. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the commodity sold by petitioner was "lumber" within the meaning of Maximum Price Regulations 215 and 290.

2. Whether petitioners' operations were covered by Maximum Price Regulations 215 and 290 as "sales out of distribution yard stock".

3. Whether petitioner's prices exceeded the maximum prices permissible under the regulations.

STATUTE AND REGULATIONS INVOLVED

Section 205 (e) of the Emergency Price Control Act of January 30, 1942, 56 Stat. 23, as amended by the Act of June 30, 1944, 58 Stat. 632 (50 U. S. C. App., Supp. V, 925 (e)), provided in pertinent part as of May 3, 1945, the date of the institution of the proceeding involved herein:

> If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business

may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation. * * * If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by

> the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

The pertinent provisions of Maximum Price Regulations 215 and 290 in effect during the period involved in this case are set out in the discussion of those Regulations, *infra,* pp. 7–11. The full texts of both Regulations are published in Pike and Fisher, *OPA Price Service, Lumber Desk Book,* Vol. 2, pp. 31,001 et seq., and Vol. 1, pp. 12,001 et seq., and 8 F. R. 14145, 9 F. R. 2554, 12276, and 9 F. R. 5727.

STATEMENT

On May 3, 1945, the Price Administrator filed a complaint in the District Court for the Eastern District of Wisconsin, pursuant to Section 205 (e) of the Emergency Price Control Act of 1942, as amended, alleging that petitioner had sold lumber at prices in excess of the maximum prices established by Maximum Price Regulations 215 and 290 and praying for a judgment for three

times the amount by which petitioner's prices exceeded the allowable maximum prices thereunder (R. 1–3).[1] Following a trial before the court without a jury, the district court found that petitioner had sold lumber on eleven different occasions between August 2, 1944, and January 18, 1945, for the aggregate sum of $9,538.66, which totalled $5,528.63 above its ceiling price (R. 100–101). Judgment was rendered against petitioner for $8,292.94, or one and one-half times the overcharges, together with costs (R. 101–102). On appeal to the Circuit Court of Appeals for the Seventh Circuit, the judgment was affirmed (R. 129).

Briefly, the facts as shown by the evidence and as found by the trial judge are as follows:

Petitioner operated a retail lumber yard at Sheboygan, Wisconsin, and in connection with and as part of the yard it operated a mill with various machinery such as saws, shapers and moulding machines (R. 11, 15, 34–35, 95). During 1944, petitioner manufactured tent poles of various sizes and lengths which were made principally from Sitka Spruce lumber purchased by petitioner from Oregon and Washington (R. 11–12).

[1] The complaint also sought and the district court granted injunctive relief, which is not now in issue. It also charged a violation of M. P. R. 196 in the sale of dowels, but that charge was dropped after a pre-trial conference at which the trial judge stated that in his opinion, petitioner had not sold dowels at prices in excess of its ceiling price for that particular item (see R. 5–6).

The trial judge found (Finding 3, R. 99–100) that—

> * * * The residue of the lumber from the manufacture of the tent poles was of various sizes and shapes and in normal times would have been sold as scrap. In the manufacture of the tent poles the residue also went through the saws and molding machines and was surfaced on two or more sides. The knots were cut out and the edges were cut off and the pieces were cut to specified dimensions and lengths. * * *

Petitioner "tried to sell the lumber" consisting of the residue from the pole manufacturing operations by advertising in trade publications and eventually sold a number of orders to a Chicago toy manufacturer (R. 13–15; Pl. Exs. 1 and 2, R. 17, 29, 81–93; Findings 3 and 4, R. 99–100). These sales, aggregating $9,538.66 during the period from August 2, 1944, to January 18, 1945 (Finding 6, R. 100), were made both on a lineal and board foot basis; the prices on the residue sold on a lineal foot basis varied from $30 to $110 per 1,000 feet, while on a board foot basis the price generally was $100 per 1,000 feet (see Pl. Ex's 1 and 2, R. 81–93; R. 95). An O. P. A. lumber price specialist testified and the trial judge found that the applicable maximum price fixed by M. P. R. 290 was $15 per 1,000 board feet (R. 18–19, 96–97), which was the price fixed by the regulation for "non-listed" lumber for which the seller

had failed to obtain O. P. A.'s approval of a maximum price (see M. P. R. 290, Article V, Sec. 11 (d), *infra,* p. 11). Petitioner had not applied to O. P. A. for approval of a specified price for these sales of the residue (R. 69, 100).

ARGUMENT

Since the issues presented by the petition require an understanding of the scope and operation of Maximum Price Regulations 215 and 290, we start with a description of their pertinent provisions in the context of the entire regulatory scheme.

As its name—"Distribution Yard Sales of Softwood"—implies, M. P. R. 215 (8 F. R. 14145, 9 F. R. 2554) covered sales of various types of softwood lumber by distribution yards. Section 3 (b) provided:

> *Products covered.*—This regulation covers sales out of distribution yard stock of any lumber or lumber products for which "direct-mill" maximum prices are fixed in the following maximum price regulations, as well as any later revisions or amendments:
>
> * * * * *
>
> Sitka Spruce Lumber—M. P. R. 290.
>
> * * * * *

Section 4 of the Regulation provided that items were to be priced by taking the f. o. b. mill maximum price for the species as specified

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in the mill regulation in effect at the time of delivery, and adding thereto the mark-ups for freight, handling and profit. Section 13 provided that other mark-ups could be taken in addition to freight and profit if certain processing was performed upon lumber; it stated in part as follows:

> *How to figure additions for working, kiln drying and pressure treatment*—(a) ***Basic workings.***—The following additions per MBM may be made to the maximum price of the most economical size from which the desired size may be obtained when a distribution yard is required to perform the workings and the end product is a non-standard size.[2]

Following paragraph (a), was a pricing table entitled "Maximum Milling Charges."

The Regulation also made provision for special specifications, workings or extras, which were not specifically priced under the Regulation. Section 14 read as follows:

> *Special specifications, workings, or extras.*—For special workings, specifications, services or extras not specifically priced under any provision of this regulation, the seller should apply to the Lumber Branch of the Office of Price Administration, Washington, D. C., for instructions. In the application the seller must set forth the amount customarily charged (not to

[2] Section 13 (a) was amended in October, 1944 (9 F. R. at 12276), but the amendment made no material change.

exceed the maximum price fixed by the regulation previously controlling), for the special working, specifications, service or extra, or in the absence of a customary charge, the amount which in his opinion represents a fair and reasonable charge, together with a statement of how it was arrived at. Instructions will be furnished by letter or telegram. After filing an application the seller may quote and deliver at the requested price, but must not accept final payment until a price has been approved. If a price is not approved within 30 days after application has been made, the price for which approval is requested shall be deemed to have been approved and may be used by the seller. Instructions issued pursuant to this paragraph apply only to the particular seller who has applied for them.

The term "Distribution Yard" was defined in Section 16 (a) as follows:

> "A typical distribution yard" is a wholesale or retail lumber yard which gets lumber from mills or other yards; unloads, sorts, and resells or redistributes it; which regularly maintains a varied stock of lumber from different regions; which gets its lumber, except for local species, mostly by rail and sells mostly for truck shipment; which is equipped to make quick deliveries of many different items of lumber; and which has been located at its particular site in order to be near a lumber consuming area.

As is evident from the terms of Sections 3 (b) and 4 of M. P. R. 215 (*supra,* pp. 7–8), a seller subject to that regulation determined his price by adding various permissible charges to the f. o. b. mill price fixed by the applicable mill regulation. In the instant case, therefore, since petitioner sold Sitka Spruce lumber, the f. o. b. mill price fixed by M. P. R. 290 furnished the basis for determining its distribution yard maximum price under M. P. R. 215. We turn therefore to M. P. R. 290 (9 F. R. 5727).

Section 2 of M. P. R. 290 specified the products covered by it as follows:

> This regulation covers all Sitka spruce (picea sitchensis) lumber, * * * whether the grades, sizes and specifications are specifically named in the price tables in Article V or not. * * *

Article V of the Regulation contained twelve price tables for various grades, specifications and sizes of Sitka Spruce. The particular item sold by petitioner was not of the character or specifications comprehended by any of these tables. However, Section 11 provided:

> (a) If a seller wishes to sell a grade which is not specifically priced in the price tables or wishes to make an addition for special workings, specifications, services, or other extras for which additions are not specifically permitted, he must apply to the Lumber Branch, Office of Price Ad-

ministration, Washington 25, D. C., for a maximum price. * * *

* * * * *

(d) On any sale involving a "non-listed" price or addition contemplated by paragraph (a) of this section, if the seller, for any reason, shall have failed to apply for approval of a maximum price under paragraph (a), the maximum price for the item sold shall be $15.00 per 1,000 board feet, which maximum price shall include all allowances or additions for grade, size, conditions, special workings, specifications or other extras.

1. Petitioner's principal contention is that the residue from the tent pole operations which was sold to the Chicago toy manufacturer was not "lumber" within the purview of Maximum Price Regulations 215 and 290 but was what is known in the trade as "dimension stock" or "cut stock" (Pet. 8–15). Preliminarily, it should be noted that the trial court, after hearing evidence on both sides with respect to this issue, found as a fact that the material was "lumber" within the meaning of that term as used in the Regulations (Finding No. 4, R. 100). Consequently, petitioner's attack upon the credibility of the Government's evidence on this issue as measured against its conflicting evidence, is plainly not an appropriate matter for appellate consideration. Rule 52 (a), F. R. Civ. P. In any event, it is clear that the trial judge was correct in this finding.

Petitioner's claim that the wood involved here was not "lumber" because of the milling operations it had performed, ignores the pricing theory underlying the regulation. While M. P. R. 290 was designed to set, so far as possible, fixed prices for all standard sizes and cuts of Sitka Spruce, nevertheless, by reason of the Administrator's realization that items other than standard sizes and cuts might be sold, the regulation expressly provided that it covered all Sitka Spruce lumber "whether the grades, sizes and specifications [were] specifically named in the price tables in Article V or not." Section 2, M. P. R. 290, *supra,* p. 10. The regulation then provided that non-standard or "non-listed" items could be sold by application to O. P. A. for a maximum price. Section 11, M. P. R. 290, *supra,* p. 10; see also similar provisions in Section 14, M. P. R. 215, *supra,* pp. 8–9.

This regulatory pattern resulted, as the district court found (R. 96), from the fact that it would have been impossible to draft a regulation providing a fixed price for every conceivable length and width. Consequently, to limit the application of the regulation only to those lengths, widths, and workings specifically mentioned would invite evasion of the regulation and defeat effective price control, for a seller could then take a piece of lumber listed in the regulation and, by sawing off one foot, or even one inch, or planing one side, contend that the product was not covered by

the regulation. Certainly the provisions of Sections 2 and 11 of M. P. R. 290 effectively block any such contentions or evasion. The administrative intention to include the items in question here within the coverage of the regulations is further buttressed by the fact that on May 12, 1944, which preceded the dates of the sales in question here, the Administrator issued and published an interpretation covering this specific situation, and to which the lower courts gave effect (R. 96–97, 125). That interpretation read as follows:

> *Mill trims.*—Short lengths not specially priced, sold on the basis of grade or other specification for use in the manufacturing of toys, small boxes, novelties, etc., are lumber and are subject to the special pricing provision under the applicable mill regulation.

That this administrative construction should be followed is clear from the opinion in *Bowles* v. *Seminole Rock and Sand Co.*, 325 U. S. 410, 413–414, where this Court said:

> Since this involves an interpretation of an administrative regulation, a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. * * * But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

Petitioner, however, argues that the administrative construction of the term "lumber" is contradicted both by a W. P. B. order, set out in the margin,[3] defining the term (Pet. 8–11), and by the testimony of its witnesses that in trade practice this material was not considered to be lumber (Pet. 14–15). While it is true that the W. P. B. order did excude the materials in question here from its definition of lumber, that fact has no bearing on whether the items were to be treated as lumber for purposes of price regulations, for the functions, purposes and powers of O. P. A. and W. P. B. were different. When W. P. B. defined lumber, it did so with a view to limiting the terms to such types of that commodity as were essential to the successful prosecution of the war, so that their use could be restricted by a priorities system. On the other hand, O. P. A. was concerned with fixing maximum prices for all commodities, without regard to the necessities of a priority system and solely with the view to maintenance of the general price

[3] W. P. B. Order No. L–335 (R. 38–40), issued June 23, 1944, defined lumber as follows:

"'Lumber' means any sawed lumber of any species, size or grade, including round edge, rough dressed on one or more sides or edges, dressed and matched, ship-lap worked to a pattern or grooved for splines, except dogwood, persimmon, rattan, balsam and aircraft grade of Sitka spruce, shingles, lathes and slabs, mile ties and railroad cross ties, sawed or hewed, edgings, trim and offal less than three inches wide or less than four feet long, unless made into standard commercial lumber sizes or patterns."

structure and avoidance of inflation. Obviously, therefore, the definition utilized by W. P. B. would be narrower than that used by O. P. A. Furthermore, the use of the W. P. B. definition for price control purposes would have the effect of invalidating portions of M. P. R. 290, for the W. P. B. definition excludes, among other things, "shingles, lath and slabs"—items which are specially priced in Table 16 of M. P. R. 290, entitled "Sitka Spruce Lath and Shingle Bands." In short, what the term "lumber" means can only be resolved by reference to the purpose sought to be accomplished, for as is so common in statutes and administrative regulations the same word used in different contexts acquires different meanings. What W. P. B. considered lumber is of no significance in the instant case.

Petitioner's argument that the testimony of its witnesses shows that in trade practice only such wood as is cut to standard sizes and lengths is considered lumber (see, e. g., R. 57, 61), is similarly unavailing, for even if that were local trade understanding, it is clear, as we have already shown, that Maximum Price Regulations 215 and 290 were in terms given far more comprehensive coverage so as to control and provide mechanisms for price determination for nonstandard items. Section 14, M. P. R. 215, *supra,* pp. 8–9; Sections 2 and 11 M. P. R. 290, *supra,* pp. 10–11. And it is well settled that the Administrator's "definition need not necessarily be one which conforms to

common usage, or to dictionary precision, or to the understanding of the trade." *Marlene Linens* v. *Bowles,* 144 F. 2d 874, 876 (E. C. A.). See also, *Fox* v. *Standard Oil Co.,* 294 U. S. 87, 96; *Bowles* v. *Jones,* 151 F. 2d 232, 234 (C. C. A. 10).

2. Petitioner also contends (Pet. 15–16) that Maximum Price Regulations 215 and 290 did not cover its operations whereby the scrap lumber involved was derived because the operations were not "sales out of distribution yard stock" within the meaning of Section 3 (b) and 16 (a) of M. P. R. 215, supra, pp. 7, 9. Petitioner argues that the items sold to the toy company were not products of its lumber business but were those of its finishing mill, an entirely different operation. However, the trial court found (Finding of Fact 2, R. 99):

> * * * In the operation of its lumber yard the defendant ordinarily purchased lumber from mills other than yards, which was generally shipped to its yard by rail, where it was unloaded, sorted and resold, generally for truck shipment. The defendant regularly maintains a varied stock of lumber and is equipped to make quick deliveries of many items of lumber. Defendant's lumber yard is located at this particular site in order to be near a lumber consuming area.

This finding, of course, places petitioner's operations squarely within the definition of a typical "distribution yard," as set forth in Section 16

of M. P. R. 215. Nor does the fact that the lumber was changed in size and shape by processing in petitioner's yard alter the applicability of the regulation. There is nothing in the regulation that so provided. Moreover, petitioner's argument ignores the significance of Section 13 (a) of the regulation (*supra,* p 8), which provided for additions to the maximum price for milling performed by a distribution yard in conformance with the table of "Maximum Milling Charges" there set forth, and of Section 14 (*supra,* pp. 8–9), which allowed a seller to apply for additions to the maximum for "special workings, specifications, services or extras not specifically priced under" the regulation.

It is clear, therefore, that M. P. R. 215 contemplated that distribution yards, which performed milling work in connection with yard operations, would be covered by the regulation and that the prices for the lumber as milled would be subject to the maxima fixed by the regulation.

3. Finally, petitioner contends (Pet. 16) that "the worst error of all those made by the court below was that it assumed that if the material here was lumber, and if the regulations applied to these operations of Petitioner, then the maximum base price permissible was $15,000 [$15.00] per thousand board feet (R. 127). The court below rejected Petitioner's argument that its sales were covered by Condition 20 of Table 5 of M. P. R. 290, which concededly allowed maximum prices

higher than those charged by Petitioner." The error, however, is petitioner's, for at the trial, after government counsel had asserted in his opening statement that the only issue was whether petitioner's sales were covered by the regulations in question and that under M. P. R. 290 the base price for the lumber was $15 per thousand feet by reason of petitioner's failure to obtain O. P. A. authorization for any other price for this "non-listed" item (R. 7–9; see also Order Following Pre-Trial Conference, R. 5–6), petitioner virtually stipulated that the issues were thus narrowed and stated that "we do not take issue with the method of pricing as stated by counsel" (R. 9). Thereafter, the entire trial concerned the questions discussed in points 1 and 2 above and no evidence was taken or inquiry made as to whether the pricing method advanced by the Government and acceded to by petitioner was correct. In this setting, it would seem that petitioner is foreclosed from asserting that the pricing method adopted below was error, for otherwise the Government would be deprived of the opportunity, which would have been available had this issue been timely raised at the trial, to meet and overcome petitioner's contention. This is not mere technical insistence on petitioner's laches, but is bottomed on the undeniable fact that further evidence would have been necessary to determine with any degree of certainty whether

the lumber was of grades, sizes and specifications such as to qualify under Table 5 or any of the other eleven tables contained in Article V of M. P. R. 290.

In any event, petitioner's present contention as to the proper method of pricing the lumber is wrong and is predicated upon an unwarranted application of only one sentence of the Regulation taken entirely out of its context. Petitioner points to Item 20 under Table 5, Article V of M. P. R. 290 which reads:

> Cut Stock: Special cut-up stock to specified sizes, use R/L price of grade specified.

Petitioner argues that this specification described the lumber in question and that since the lumber was "clear cuts," Price Table 5 of M. P. R. 290, entitled "Sitka Spruce Finish and Clears," applied. The error in this approach is that petitioner, being a distribution yard, ascertained its price by starting with M. P. R. 215. That regulation contemplated the determination of the distributor's price by adding various charges for freight, milling, etc. to a base price for the lumber as received by the distribution yard, the base price in turn to be derived from the applicable mill price regulation. The lumber received by petitioner was not "clear cuts" to which Table 5 of M. P. R. 290, the applicable mill price regulation,

could be applied.[4] Accordingly, since no other table in M. P. R. 290 covered the lumber as prepared by petitioner and since petitioner failed to apply for a price, its price was $15 per thousaid feet as provided by Section 11 (d), Article V, M. P. R. 290 (*supra*, 11).

CONCLUSION

The findings and judgments below are correct and no conflict of decisions or question of general importance is involved. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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[4] Petitioner argues that the courts below confused the issue by not appreciating that regardless of what petitioner bought, what it sold was "clear cuts." However, as shown in the text, what petitioner bought and reworked as a distributor is the only factor relevant for purposes of utilizing M. P. R. 290 in arriving at an initial base price. Moreover, it is not entirely clear that what petitioner sold was "clear cuts" within the meaning of Table 5, M. P. R. 290 (see, e. g., R. 12), and had the issue now raised been presented at the trial, the Government might have adduced evidence to show that it was not.

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